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In the Supreme Court of the United States

OCTOBER TERM, 1979

NED N. RICHARDSON AND DOROTHY M. RICHARDSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2) is reported at 599 F.2d 290. The opinion of the district court (Pet. App. A-19) is unreported.

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[1] The United States was the sole plaintiff-appellee in the court of appeals and, therefore, is the sole respondent in this Court. The caption of the petition incorrectly designates the Secretary of the Interior as the sole respondent. The Secretary has never been a party to this case. See Rule 21(4) of this Court; compare *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 89 (1946).

JURISDICTION

Judgment was entered in the court of appeals on May 11, 1979.[2] Rehearing was denied on July 9, 1979 (Pet. App. A-1). The petition for a writ of certiorari was filed on October 9, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' blasting and bulldozing constituted an unreasonable method of mineral exploration needlessly destructive of surface resources under the Surface Resources Act, 30 U.S.C. 612.

STATUTE INVOLVED

The Surface Resources Act, also known as the Multiple Surface Use Act, is Section 4 of the Act of July 23, 1955, ch. 375, 69 Stat. 367, 368-369, 30 U.S.C. 612, which states in part:

> (a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
>
> (b) Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States

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[2] The judgment of the court of appeals is not appended to the petition. See Rule 23(1)(j) of this Court.

to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *.

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

STATEMENT

Since 1970, petitioners have held six unpatented mining claims [3] on public land of the United States in Skamania County, Washington, within the boundaries of Gifford Pinchot National Forest. The United States has admitted, for "purposes of this case only" (Stip. ¶ 3),[4] that petitioners are lawfully in possession of these mining claims.[5] Petitioners, in their turn, have conceded that they located their claims "subject to" the requirements of the Surface Resources Act, 30 U.S.C. 612 (Stip. ¶ 9).

Petitioners proceeded to explore the claims in order to develop a mine, using dynamite, bulldozers, and backhoes for surface excavations and trenching (Pet. App. A-3). Between 1970 and 1973, petitioners admit digging and blasting two trenches: one about

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[3] Rights attendant to unpatented mining claims have most recently been described in *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 605-607 nn.3 & 4, 615-616 (1978). See also *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963).

[4] "Stip." refers to the Stipulation and Pretrial Order filed January 26, 1977.

[5] Nevertheless, in October 1973 the Forest Service, Department of Agriculture, commenced administrative proceedings within the Department of the Interior to contest petitioners' claims and seek their cancellation for lack of discovery of any valuable mineral. *United States* v. *Ned N. Richardson, Dorothy M. Richardson, et al.*, Contest No. OR13345 (Wash.) 3920 (943.1). The administrative proceeding is still pending within the Bureau of Land Management, Department of the Interior. Its commencement predated, by approximately one month, the commencement of the instant case.

75 by 65 by 12 feet deep; another about 300 by 80-100 feet wide by 15 feet deep (Stip. ¶ 5; Pet. 4). Including the two trenches, all areas of surface disturbance affected 1.6 acres of national forest land (Pet. App. A-3). Periodic bulldozing also caused excavated overburden to slide into and occasionally obstruct Forest Services roads, to silt streams, and to impair natural drainage. The two trenches remained open in May 1975, one month after this case was tried (Pet. App. A-21, A-22 to A-23).[6]

In November 1973, this action against petitioners was commenced on behalf of the United States. The government requested a permanent injunction against further blasting and bulldozing on these six mining claims and a money judgment for costs of restoring surface areas already disturbed by such operations (Appellee's Br. 4-5). After submission of agreed facts in a pretrial order, the major factual dispute remaining was whether blasting and bulldozing were reasonable methods of exploring these six mining

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[6] The petitioners' assertion (Pet. 4) that "the Forest Service stopped their operation" in 1973 is not completely accurate. The record fails to show that any Forest Service employee had ordered—either formally or informally—a halt to all exploration before this case was filed in the district court. The pretrial stipulation merely recites that the Forest Service at some point "ordered [petitioners] * * * to cease digging trenches by blasting and bulldozing" (Stip. ¶ 4). It was not until a year later, August 28, 1974, that the Forest Service adopted the regulations which now enable the Service to control, through its administrative process, the manner by which mining and prospecting are done in national forests; see 36 C.F.R. Part 252.

claims or not. The district judge, to whom the issue was tried, found that they were not.[7]

The court of appeals found (Pet. App. A-19) that "utilization of blasting and bulldozing [in the areas where the two trenches were dug] * * * was unreasonable under the circumstances" (*id.* at A-25); that, because of newer, "nondestructive" methods of mineral exploration, "such as core drilling," it was "no longer standard procedure to strip away the overburden to expose the bed rock, especially during the initial exploration stage in which [petitioners] * * * were engaged" (*id.* at A-24 to A-25); and that such "destruction and removal of surface resources on the mining claim far exceeds that which was required to perform prospecting activities" (*id.* at A-32).[8] The court of appeals did not set aside these findings (Pet. App. A-11), and petitioners do not now assail them as clearly erroneous.

The district court's final judgment and decree permanently enjoined petitioners from "conducting pros-

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[7] The district judge heard expert witnesses for both sides and personally viewed the mining claims and the sites excavated by petitioners (Pet. App. A-21).

[8] The district court's findings comported with the trial testimony of the government's expert geologist. After examining petitioners' mining claims, this expert geologist stated that their continued exploration was justified in order to ascertain "the presence of commercial grade ore." But he cautioned, "the only acceptable initial approach to exploration of this type deposit would be core drilling after performance of all applicable surface geotechnical surveys. Small area excavations are virtually meaningless for this type of problem" (Pet. App. A-4).

pecting operations by means of bulldozing or blasting" on their six mining claims (Pet. App. A-37).[9] Petitioners appealed, and the court of appeals affirmed. The Ninth Circuit ruled, as had the district court (Pet. App. A-30 to A-31), that the Surface Resources Act, 30 U.S.C. 612, supported the injunction here. Testimony from congressional committee hearings, held when the Surface Resources Act was under consideration, was quoted to show that "Congress was aware of the problem of excessive bulldozing" on mining claims and meant to protect only uses "reasonably incident" to mining (Pet. App. A-10, A-16 to A-18). Because petitioners "did not have a mine, [but] * * * had a prospect," and were still exploring, the Ninth Circuit concluded, as had the district court,

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[9] A money judgment for $2,263.13 was also entered against petitioners. The money judgment represented the cost to the Forest Service of restoring the area where one of the two trenches had been dug; restoration work was to consist of filling trenches and providing drainage (Pet. 13). Prior to judgment, the district court had announced that it would consider issuing a mandatory injunction compelling the petitioners themselves to restore the area unless the parties, within 120 days, could settle on a joint plan of restoration (Pet. App. A-32, A-33). When no such joint plan emerged, the district court entered judgment for restoration costs instead of enjoining petitioners to perform the restoration work.

Petitioners never asked for an opportunity to contest the restoration costs before judgment. The government stated, in its brief to the court of appeals (Br. 31 n.23), that it would not object "to a remand for the limited purpose of granting * * * [petitioners] a hearing to contest the reasonableness of the dollar figure for restoring" the area in question. The court of appeals never addressed the matter.

that their "methods of exploration were unnecessary and were unreasonably destructive of surface resources and damaging to the environment" (Pet. App. A-11).[10]

ARGUMENT

The decision of the court of appeals is correct. It conflicts with no decision of this Court or any other court of appeals, and further review of this essentially fact-bound case is unwarranted.

1. The court of appeals and district court ruled that the Surface Resources Act, 30 U.S.C. 612, was intended to reconcile the competing interests of the United States, as holder of paramount title to the public lands, and those of mining claimants in the use of surface resources on such lands (Pet. App. A-10 to A-11, A-30). Admittedly, mining claimants who have located claims under the General Mining Act of 1872, 30 U.S.C. 22 *et seq.*, are afforded broad possessory rights to the surface within the limits of their claims, see, *e.g.*, 30 U.S.C. 26. Yet such rights have never been limitless. "Under the mining laws Congress has made the public lands available to people for the purpose of mining valuable mineral deposits *and not for other purposes*," *United States* v.

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[10] The district court had previously stressed that it was not imposing any "absolute prohibition" on mining or exploration activities on the six mining claims, saying petitioners "were requested to use an alternative method of prospecting which would have lessened their activities' impact on environment and surface resources while producing superior information at a lower cost" (Pet. App. A-31).

Coleman, 390 U.S. 599, 602 (1968) (emphasis added; footnote omitted). With passage in 1955 of the Surface Resources Act the rights of mining claimants to surface uses were more clearly defined. The Act's purpose "was not to abolish mining claims or to significantly alter mining law, but *to limit the use, or misuse, of surface resources* * * * by a mining claimant prior to the issuance of a patent," *Converse* v. *Udall*, 262 F.Supp. 583, 585 (D. Ore. 1966), aff'd, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969) (emphasis added). Accordingly, petitioners' assertion (Pet. 10-11) of an absolute right to prospect, mine, or explore any way they see fit is unsupportable. So, too, is their assertion (Pet. 13) that the government must prove that they are trespassers before a court can grant relief. Waste of surface resources is a sufficient ground for relief. *United States* v. *Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The Act explicitly forbids mining claimants to "sever, remove, or use any vegetative or other surface resuorces" except to the extent "required" for "prospecting, mining or processing operations and uses reasonably incident thereto," for structures "in connection therewith," or "to provide clearance for such operations or uses." 30 U.S.C. 612(c). The House committee considered this text and concluded:

> This language, read together with the entire section, emphasizes recognition of the dominant right to use in the locator, *but strikes a balance, in the view of the committee, between competing*

> *surface uses, and surface versus subsurface competing uses.* [Emphasis added.]

H.R. Rep. No. 730, 84th Cong., 1st Sess. 10 (1955). Accord, S. Rep. No. 554, 84th Cong., 1st Sess. 9 (1955).

Both courts below correctly concluded that under the Act mineral prospecting and exploration techniques are subject to a rule of reason (Pet. App. A-11, A-32 to A-33). The unreasonableness of petitioners' conduct here is manifest.[11] While no judicial remedy is provided for in the Act, the district court properly fashioned an equitable remedy suitable for correcting violations of the Act. "Congress has legislated and made its purpose clear; it has provided enough federal law * * * from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960). See also *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 567-570 (1930).[12]

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[11] The findings of unreasonableness were not set aside as clearly erroneous by the court of appeals which refused to fault them "under the standard prescribed by Rule 52(a), Fed. R. Civ. P." (Pet. App. A-11). Since petitioners no longer contest the factual findings, they are bound by them. Cf. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

[12] While this case was pending in the district court, the Forest Service adopted new regulations governing the operations of mining claims in national forests. 36 C.F.R. Part 252, 39 Fed. Reg. 31317 (1974). Generally, the regulations

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

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require mining claimants to submit a "notice of intention to operate" and a detailed "plan of operations" to the Forest Service's local district ranger for approval, disapproval, or modification (36 C.F.R. 252.4-252.5). Failure to comply with the regulations or the approved plan of operations can result in issuance of a "notice of noncompliance" with instructions on corrective measures to be taken (36 C.F.R. 252.7). Any decision by a Forest Service official is appealable to the regional forester whose decision is "the final administrative appeal decision" (36 C.F.R. 252.14(a)). At no time in this case has the validity of these regulations been contested by petitioners or passed upon by the courts. This case therefore does not present any issue of more than isolated effect.

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